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From Heterogeneities to Inequalities

Social Construction of Heterogeneity Indicators and their Relationship to Law

The Example of Guiding Principles in Immigration Law

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Sebastian Müller

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DFG Research Center (SFB) "From Heterogeneities to Inequalities"

Whether fat or thin, male or female, young or old – people are different. Alongside their physical features, they also differ in terms of nationality and ethnicity; in their cultural preferences, lifestyles, attitudes, orientations, and philosophies; in their competencies, qualifications, and traits; and in their professions. But how do such heterogeneities lead to social inequalities? What are the social mechanisms that underlie this process? These are the questions pursued by the DFG Research Center (Sonderforschungsbereich (SFB)) "From Heterogeneities to Inequalities" at Bielefeld University, which was approved by the German Research Foundation (DFG) as "SFB 882" on May 25, 2011.

In the social sciences, research on inequality is dispersed across different research fields such as education, the labor market, equality, migration, health, or gender. One goal of the SFB is to integrate these fields, searching for common mechanisms in the emergence of inequality that can be compiled into a typology. More than fifty senior and junior researchers and the Bielefeld University Library are involved in the SFB. Along with sociologists, it brings together scholars from the Bielefeld University faculties of Business Administration and Economics, Educational Science, Health Science, and Law, as well as from the German Institute for Economic Research (DIW) in Berlin and the University of Erlangen-Nuremberg. In addition to carrying out research, the SFB is concerned to nurture new academic talent, and therefore provides doctoral training in its own integrated Research Training Group. A data infrastructure project has also been launched to archive, prepare, and disseminate the data gathered.

Research Project C4 “The Social Construction of Heterogeneity Criteria”

The project's starting point lies in the assertion that German migration and integration law has lost its guiding principle. The older, and themselves controversial, principles of assimilation and multiculturalism have, it is often claimed, now been replaced by a cacophony of different voices, lacking all coherence. When granting permanent residence permission or citizenship, what should be tested in order to comply with the "integration mandate" of German immigration law? The legislation displays a degree of regulatory weakness or even abstinence from regulation. For our project, several questions arise regarding immigration law:

What effect do different guiding principles have on shaping national integration law (what is their significance for legal policy)?

What effect do guiding principles have on the way the law is applied by government agencies, citizens, and migrants (what is their significance for the application of law)?

Is there a congruence of content between the guiding principles applied in the various subsystems within a multilevel legal system (what is their significance for the systematization of law)?

Our study begins with a historical analysis of the guiding principles and how they have changed in the Federal Republic of Germany. Based on legal methods, case analyses, and interviews with experts, the following questions will be addressed: (1) From an actor-related perspective: Who produces the guiding principles? Do German nationals produce them for migrants (i.e., over their heads), or do both participate in their development? (2) From an institutional perspective: Who adopts the guiding principles – produced elsewhere – into the legal system? (3) Finally, how congruent or non-congruent are guiding principles in different fields of law (residence law, social legislation, educational law)? Equal or unequal treatment in law is the key reactive and steering instrument of the legal order. It is on this basis that legally anchored inequalities arise as reactions to perceived societal heterogeneity (for example the distinction between "integrated" and "nonintegrated" migrants).

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Social Construction of Heterogeneity Indicators and their Relationship to Law

The Example of Guiding Principles in Immigration Law

Christoph Gusy/Sebastian Müller[1]

Keywords: Concept of integration, integration in law, immigration law, guiding principle of integration, labour migration

Introduction:

The goal of this project is to analyse discourse in the legal and pre-legal spheres about heterogeneities and inequalities in German immigration law. We discuss heterogeneities identified and considered legally relevant by legislative power. We assume that those heterogeneities are transformed into inequalities by law or by the law's guiding principles.

Within the Collaborative Research Centre (SFB) "From Heterogeneities to Inequalities" this project aims to identify guiding principles as symbolic mechanisms that generate inequalities in immigration law.

The history of the Federal Republic of Germany's immigration law is mainly a history of guiding principles. Legal enactments themselves have typically remained stable and have not quickly responded to actual societal developments. When the legislature has adopted new provisions, it has only been with great delay. Guiding principles, on the other hand, have undergone many changes. They created the place and forum where immigration developments could be discussed adequately. Guiding principles even – when legally and politically possible – steered migration from beyond the legal sphere. This project focuses on the guiding principles' function and effects on lawmaking and enforcement. The 'new' guiding principle of 'integration' shall be used to exemplify the interaction between the legal and the guiding principles' spheres.

[1] We thank Ms. E. Koch for her valuable help. We also thank the following for their important preparatory work which contributed to this article: Ms. Prof. Dr. Kathrin Groh (Munich, formerly of the University of Bielefeld), Ms. Dr. J. Niesten-Dietrich, scientific researcher Ms. A. Kapitza, Ms. H. Bolat and Ms. G. Bulut.

I. Guiding principles of immigration

1. Immigration without immigration law

It was in the 1950s that labour migration commenced in Germany. Migration to the labour market of the Federal Republic of Germany took place with the authorities' consent and it was to an extent actively and officially pursued as a political objective.[2] This migration was made up of two aspects. One was a stream of refugees, expellees, ethnic Germans and other migrants to Germany. These groups were motivated by their historic German decadence,[3] as well as their vulnerability to discrimination and persecution in their countries of residence, namely the Communist 'Eastern Bloc'. Article 116 of the German Basic Law (*Grundgesetz*, GG) as well as the Federal Expellees Act (*Bundesvertriebenengesetz - Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge*, BVFG)[4] provided the legal basis for this migration. Although legally treated like German nationals, problems occurred in the wake of this group's migration. The legally accepted resettlement did not allow for any significant steering measures, with the sole exception of measures to fight housing shortages in the 1950s and 1960s.[5] The permanent resettlement and continuous flow of these migrants led to practical problems and questions arising around the phenomenon. A second form of migration took place in the form of labour migrants (*Gastarbeiter*). German authorities planned and actively recruited these migrants in their countries of origin.[6] Labour migration was politically espoused and legally anticipated. It was based on solely economic considerations, which were that migrant workers should only be accepted to fill labour market gaps in industries in which there was an additional need for labour that could not be met by the domestic market or if nobody could be found for particular positions.[7]

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[2] Bade /Oltmer, Deutschland, in: Bade et al. (eds.), Enzyklopädie – Migration in Europa, München 2010, p. 159.
[3] Vogel, Die Migration im Hintergrund: Strukturen der Integrationspolitik in Deutschland, in: Baasner (ed.), Migration und Integration in Europa, Baden- Baden 2010, p. 43.
[4] Klekowski von Koppenfels, Aussiedlerpolitik und -verwaltung in der Bundesrepublik, in: Oltmer (ed.), Migration steuern und verwalten, Göttingen 2003, pp. 403ff.; § 6 BVFG.
[5] Schwarz, Wochenschau: Westdeutsche Identität und Geschichte in den fünfziger Jahren, Frankfurt a. M. 2002, p. 387.
[6] Weber, Ursachen und Konsequenzen der Ausländerbeschäftigung, in: Schlaffke /Von Voss (eds.), Vom Gastarbeiter zum Mitarbeiter, Kevelaer 1982, pp. 26f.
[7] ibid.

The decision to allow immigration was subordinate to Germany's economic interests. During the time of full employment in Germany, from early 1960s to mid-1970s, it amounted to a decision for economic opportunity and growth.

Migration policy focused mainly on economic – factual or assumed – necessities. The legal provisions, however, did not significantly change.[8] Although the legislature replaced the pre-constitutional Aliens Police Regulation (*Ausländerpolizeiverordnung*, AuslPVO) with the Aliens Act (*Ausländergesetz*, AuslG) in 1965,[9] this did not include any provisions relating to permanent migration. In the tradition of the preceding enactment, immigration was not perceived as something favourable for the 'interests of the Federal Republic of Germany'[10] but rather something which, as a rule, should be prevented. Immigration was only considered in such cases in which conflicting interests clearly did not occur.[11] Society as a whole had however greatly changed by this time, and these changes were mirrored in the Administrative Regulations of Social Law (*Ausführungsverordnungen zum Sozialrecht*). It has to be highlighted that these were regulations enacted by the executive, usually the responsible federal ministry. This kind of legal framework shaped immigration law for a long period of time. The most characteristic aspects can be summarised as follows:

- The question of immigration – planned and politically endorsed – was not addressed in legislation, but in executive regulations and thus transferred from the legislature to the executive.
- The migration and integration responsibility was ascribed to social ministries or social authorities, creating parallel structures with ministries for the interior or police authorities and leading to tensions between executive branches.
- The omission of legal steering measures and criteria which opened the playing field for steering authorities, measures and criteria outside the legal sphere.

[8] Rittstieg, Gesellschaftliche und politische Perspektiven des Ausländerrechts, in: Ansay /Gessner (eds.), Gastarbeiter in Gesellschaft und Recht, München 1974, p. 56.
[9] Aliens Police Regulation (*Ausländerpolizeiverordnung*) from August 22th 1938, RGBl. I p. 1053; Aliens Act (*Ausländergesetz*) from April 28th 1965, BGBl. I p. 353; BT- Drs. IV/ 868, p. 13.
[10] To these BVerfGE 49, 168 = DÖV 1979, 918 with a comment by Weber; § 2 para. 1 sentence 2, § 7 para. 2 sentence 2 AuslG.
[11] Gusy, Ermessen und Ermessensbindung im Ausländerrecht, in: VBlBW 1984, p. 393.

The Parliamentary Council, or the German legislature,[12] explicitly addressed and regulated in legal enactments the immigration of ethnic Germans or former expellees after the Second World War. Concurrently, the aforementioned labour migration was legally unfettered. This applied to the question of whether immigration should take place, the requirements for migrants and overall objectives. The developments in society concerning immigration took place in what was, strictly speaking, an unregulated field, below the level of statutory law. It was a politically endorsed characteristic feature of the time to allow immigration without legal steering, as long as it served the economic 'interests of the Federal Republic of Germany'. Economic interests, rather than legal requirements, steered and determined immigration. To prevent misunderstanding: immigration was subject of regulation or steering, but this was not legal regulation or steering. Administration – ministries and regional or local authorities – as well as courts developed applicable standards. They had to decide on the basis of existing legislation. But as the legal provisions did not address the issues to be determined, or at least not clearly, the legal gap was filled with recourse to other sources. This vacuum led to legal guiding principles being employed.

2. From rotation to integration – some guiding principles

Many guiding principles have shaped the discussion on immigration in the past. The same applies to current debates. At the start of post war immigration, the rotation principle was prevalent: migrant workers should be granted a temporary residence and work permit with the obligation to return to their countries of origin once the permit expired.[13] Due to economic constraints, and partly for legal reasons, new guiding principles emerged following the rotation principle. After the prosperous years of the 1950s and 1960s, the German economy suffered a severe recession.[14] The economic and social framework conditions in the 1970s dramatically reduced chances for foreign workers to find a position and to yield an income. There was no

[12] On 19 May 1953 the German Bundestag (German Federal Parliament*),* with the consent of the Bundesrat *(*Federal Council of Germany), enacted the Federal Expellees Act (BVFG), BGBl. I p. 201; Promulgation of the financial settlement and compensatory payment law (EALG) on April 27th 1994, BGBl. I p. 2624.

[13] Hermann, Reizwort Rotation, in: Schlaffke /Von Voss (eds.), Vom Gastarbeiter zum Mitarbeiter, Köln 1982, pp. 50 ff.

[14] Schönwälder, Ausländerpolitik der Bundesregierung der 1960er und frühen 1970er Jahren, in: Oltmer (ed.), Migration steuern und verwalten, Göttingen 2003, pp. 125 f.

longer any need for labour migration and so the perception of migration changed.[15] This had repercussions for the guiding principles. As a result, the rotation principle was revised and replaced with a differentiated concept. The language in the debates disclosed a still prevalent perception that differentiated between citizens, i.e. the 'German' population, and the 'foreign' population, rooted in the early concept of the Aliens Law. Although though the notion changed from referring to immigrants to foreigners to fellow citizens (*Mitbürger*), the final step of linguistic integration, to *simply* citizens, was still to take place.[16] But what were the resulting changes? The migrant 'settled population',[17] which was already living in Germany, was accepted, while new immigration was subject to stricter steering and restricting measures. These developments extended the understanding of migration policy and migration law. It was not only necessary to think about migration in terms of border crossing, a temporary residence permit and permission to work. The debate also had to address questions relating to immigrants and their social status in Germany. These developments led to a bifurcated migration policy: migrants already living within the country and foreigners wishing to migrate were perceived and treated differently. The lasting residence of migrants within Germany was accepted as matter of fact and this group increasingly gained social and other rights. However, migrants who anticipated moving to Germany faced a different policy. To migrate to Germany was perceived as an attempt to partake of the economic advantages without having contributed to it – at least in the past.[18] As such, migration had to be legitimised. Based on the concept of legitimised migration, a differentiation was drawn between 'accepted' or 'endorsed' migration and 'not-endorsed' migration. The first form of migration was promoted, or at least tolerated. The freedom of movement as part of the European Union's common market policy is an example of this.[19] The latter form of migration should be, so went the conviction, prevented.[20] It sought to close possible back doors, such as legal loopholes, that could be used to circumvent administrative

[15] Beck, Die integrationspolitische Debatte in Deutschland, in: Barwig /Davy (eds.), Auf dem Weg zur Rechtsgleichheit?, Baden- Baden 2004, pp. 26 f.
[16] We would like to thank Ms. Prof. Dr. G. Lübbe-Wolff, Bielefeld for this comment.
[17] The term is used in the title of the miscellany edited by Davy (ed.), Politische Integration der ausländischen Wohnbevölkerung, Baden-Baden 1999, p. 10.
[18] Michalowski, Integration als Staatsprogramm: Deutschland, Frankreich und die Niederlande im Vergleich, Münster 2007, p. 25.
[19] Treaty establishing the European Economic Community (EEC Treaty), 25 March 1957, BGBl. II p. 766; Every person holding the nationality of a Member State (Citizen of the Union) has the right to move and reside freely within the territory of the Member States, article 45 para. 1 EU Charter and article 20 para. 2 lit. a, 21 para. 1 TFEU (before: article 18 TEC).
[20] Davy, Instrumente der Integration, in: Barwig /Davy (Fn 15) pp. 86 ff.

restrictions. The curtailment of the right to asylum, enshrined in Article 16a of the German Basic Law,[21] illustrates this approach. The ongoing debate about family reunification for migrants living in Germany is another example.[22] However, one important point merits attention: while guiding principles partially changed, the law did not change significantly – with the exception of the aforementioned asylum law.

The discussion about guiding principles intensified in the 1990s. The idea of multiculturalism[23] triggered the debate, being partly descriptive and partly policy objective driven. Presumably as a reaction to the concept of multiculturalism, the idea of a mainstream or main culture, formulated as the 'guiding culture',[24] entered the arena. Both concepts approached differently one and the same question: in which society do we live and in which society do we want to live? Convictions that sought to reverse the practice of decades of migration to Germany and bring a stop to immigration altogether remained in the domain of fringe political ideas.

The confrontation of both concepts did not pave the way for one prevailing over the other. Instead, the sometimes-heated debate resulted in a decrease of their importance. It looked like as if immigration law had lost its guiding principle. However, recently the guiding principle of integration has assumed this position for migration law. It has nothing in common with the rather polemic 'guiding' and 'multicultural' debate, and its content is not clearly defined. In other words, it is open for interpretation and thus can be filled with different content.[25] The guiding principle of integration suggests a common denominator, but leaves room what this common denominator might be. This openness could be its strength.[26]

3. Change of guiding principles – continuity of law

The briefly presented developments regarding guiding principles in immigration law illustrate certain streams of continuity, but also some aspects of discontinuity.

[21] Amendment of Art. 16 of the Basic Law (*Grundgesetz*), 28 June 1993, BGBl. I p. 1002; Gusy, Neuregelung des Asylrechts - Grundrecht oder Grundrechtsverhinderungsrecht, in: Jura 1993, p. 505 (509).
[22] Hailbronner, Der aufenthaltsrechtliche Status der verschiedenen Gruppen von Einwanderern in der Bundesrepublik Deutschland, in: Weber (ed.), Einwanderungsland Bundesrepublik Deutschland in der Europäischen Union, Osnabrück 1997, pp. 231 f.
[23] Luft, Abschied von Multikulti: Wege aus der Integrationskrise; Gräfelfing 2007, pp. 285 f.
[24] Beck (Fn 15), p. 27.
[25] Schulte /Treichler, Integration und Antidiskriminierung, Weinheim 2010, pp. 44 f.
[26] ibid.

Certainly, the subject of the guiding principles has altered. The rotation principle laid the focus on steering and restriction of migration to Germany, and thus a restriction of the number of migrants living in Germany.[27] The focus of the recent idea of integration has shifted towards the migration population already living in Germany. Immigration and its results are taken as fact and are accepted as such. It is irreversible, due to both factual developments and European Union legislation. European Union legislation in particular determines and concurrently curtails the scope of domestic migration discussions. The German legislature retains jurisdiction only over migration from non-European countries, which in practice means migration from Turkey. The once-emphasised reasoning as to why ethnic Germans should be treated differently to migrants with other backgrounds has lost relevance. As the focus shifted to migrants living in Germany, problems occurred regarding both groups. For someone who has lived for many years in a new country, the reason for his or her migration loses its meaning and the societal situation in the new country starts to assume a decisive position. The guiding principle determining the migration of ethnic Germans was also challenged by another development. The non-migrant population living in Germany in the post-war era perceived ethnic Germans and expellees differently than they did in the period following German reunification. Apart from their differing legal status, the societal situation of both groups did not necessarily differ. Another parallel development could be ascertained: according to German law, the status of 'expellee' could be inherited. In a non-legal sense, the status of migration could also be inherited, at least for a large group of persons. The second or third generation of the immigrated population, for instance, has not migrated to Germany themselves, but in societal and political debates the notion of a German national with migration roots (*Migrationshintergrund*)[28] has become common. Without any legal meaning and sociologically questionable, under this concept migration itself ends, but the roots or the background of migration remain. A discontinuity can also be indentified: the guiding principle of rotation only referred to the status and behaviour of migrants. The principles of multiculturalism and integration did not exclusively refer to the foreign or migrant population. Instead,

[27] Hecht, Metropole Berlin, Multikulturelle Stadt oder Stadt der Parallelgesellschaften?, Norderstedt 2005, pp. 35 f.
[28] Krönner, Fachkräfte mit Migrationshintergrund in der sozialen Arbeit: Grenzen und Chancen von zugewanderten SozialarbeiterInnen in Deutschland, Hamburg 2009, p. 30.

these ideas also include the non-migrant population and perceive both as part of one society.[29]

It can be drawn from our observations that guiding principles changed and discontinuity was prevalent. However, the law was not subject to comparable developments. The legislature ignored this until the 1990s when factual immigration conditions resulted to a non-regulation of immigration under the law. The political and ideological debate as whether Germany should be considered a country of immigration[30] had the effect of obfuscating necessary changes in the law. Thus the legislature did not adapt the then-applicable Aliens Law to the already existing situation and societal developments in Germany. The societal changes as a result of migration and accompanying questions were mirrored in the social law (like on social benefits, unemployment benefits or health insurance). The bifurcated tradition of a differentiated regulation of immigration in social and labour law, governed by different ministries and regional authorities, thus continued. Not uncommonly, applicable standards could be found in primary legislation as well as in administrative regulations. The law covering all aspects of migration was dispersed. For instance, the provisions to be adhered to when entering the country and when issuing a residence permit – temporarily or permanently and differentiated for European Union nationals and third country nationals – were spread across a range of various legal sources. The same applies to regulation on naturalisation and questions relating to the nationality of a person. As well as this rather dispersed approach to lawmaking, the provisions did not seamlessly fit in all cases. The law for other groups of migrants – asylum seekers as well as stateless persons – was placed in additional enactments.

In the late 1990s political pressures to harmonise the law gained momentum. It became clear that the process of migration could only be understood and regulated as part of one enactment and should be seen comprehensively, in light all its facets and consequences.[31] These considerations could not be constricted in a way that only covered residence and nationality law. The law concerning social services,

[29] Luft (Fn 23) pp. 417 ff.
[30] Meier- Braun, Zuwanderung seit 30 Jahren als Chance und Bereicherung, in: Gesemann /Roth (eds.), Lokale Integration in der Einwanderungsgesellschaft, Wiesbaden 2009, p. 366.
[31] Beck (Fn 15) p. 27.

education, apprenticeship, professional rules and other matters all needed to be revised.[32]

As such, migration law – understood in a broad sense and in reference to the changed guiding principles – proves to comprehensively cover various legal fields.[33] These include:

- The multi-level regulation[34] of the European Union, the Federal state and the *Länder*, the single states of the Federal Republic of Germany. All these actors are entitled to govern and regulate different aspects of migration. It is possible to enact – on all these different levels – legislation and implement legislation underpinned with dedicated programmes and policy considerations. This is possible as long as fundamental rights or other overriding laws, which generally allow a broad margin of appreciation, are respected.
- The regulation on the level of different ministries and authorities. The Federal Ministry of the Interior and the state ministries of the interior, school and cultural ministries, social services and increasingly integration ministries assume a decisive position. These ministries, be it on the federal level or on the state level, initiate, interpret and implement legal provisions. In doing so, the varied views and different interests in the ministries or authorities can influence and thus determine the applicable legal provisions.

Given the multitude of actors and the pluralism of levels, institutions, influential and decisive parties and political streams, views, perspectives and various spheres of influence, it becomes clear that these framework conditions are mirrored in the law. These conditions result in provisions which are seemingly not coordinated or linked to each other, and may even have contradictory content. It can be argued that the rationales of various legal enactments, the egoism of different authorities or ministries, the interests of associations involved and the potential for single actors to determine legislative processes leads to a dispersed migration law. Leading on from this, it could be argued that due to this dispersed nature, migration law is receptive to different guiding principles or concrete implementation of different guiding principles. These arguments lead to the following observation: guiding principles that tend not to

[32] ibid. p. 29.
[33] Thym, Migrationsverwaltungsrecht, Tübingen 2010, pp. 275 f.
[34] ibid. pp. 280 f.

be clearly defined open the field for heterogenic interpretations as well as a diverse nature of regulation relating to that principle.

4. Guiding principles in legislation, implementation and interpretation

Many legal fields, not only migration, contain guiding principles. Guiding principles usually are not part of the law, but precede the law or are placed in a sphere outside but connected to the law. Concepts such as ‘social market economy’, ‘requirements of overall economic equilibrium’, ‘sustainability’, ‘privacy’ or ‘transparency’ all testify to this. They shape law and influence, as guiding principles, the legal system and applicable provisions, without necessarily being part of it. Guiding principles evolve outside legal norms and outside jurisprudence and scientific circles. As such, they are not important *legally*. However, their importance for the law can change. This is usually the case when guiding principles are taken into consideration in legislative processes by the legislature or when the judiciary or administration refers to them in interpreting and implementing law.[35] In doing so, guiding principles assume the role of a regulatory idea. Processes of reception – be it lawmaking or interpreting and implementing – can take place in the light of guiding principles, and as much as guiding principles shape law in this way, they can partially become obligatory themselves. Migration law displays a specific property in this regard, in that its legal provisions lack a clear statement or guiding principle. Fundamental decisions within the law that could serve as guiding principle have been more prevented than promoted. This situation exacerbates, rather than enhances, interpretation and impedes the creation of standards based on the laws. The judiciary and administration that have to implement the law need additional guidelines in order to work with the law properly, as the law itself contains only very vague criteria. It could even be said that the judiciary and administration have to invent their own criteria guiding the implementation of the law, within the legally accepted margin of appreciation. It is therefore more common for guiding principles to be taken into account in the course of interpretation and implementation of the law. It is important to note that guiding principles are not developed by those bodies, but are implemented by them. The sphere in which guiding principles are created and

[35] Spindler, Das Menschenbild des Grundgesetzes und die Rechtswirklichkeit, 2010, p. 2, online available at: http://rotary1840.de/pullach_isartal/VortraegePDF/Spindler_Menschenbild.pdf [last accessed 27.07.2012].

developed is another one, in that of literature, art, science, mass media or other fora of public discourse that serve as places to introduce such principles into societal debates and consciousness. Legal discourse can introduce guiding principles from this sphere into the legal sphere and thus allow including them as a regulative aspect of implementation. Against the background of guiding principles, provisions will be interpreted and implemented in a given case in accordance with, for instance, the social market economy principle, the sustainability principle or, in our case, the integration principle. However, it is a societal and discursive process of several steps before a guiding principle interacts with legal provisions. These principles are invented or created outside the legal realm of administrative procedures and judgments. It is only later that authorities or the judiciary discovers them and adapts them to the applicable law. The law might then be interpreted in the light of the principle and, finally, a concrete case might be decided accordingly. These processes for introducing and applying extra-legal criteria to legal standards lie at the centre of our project.

It is not that no alternative exists to such processes. It is possible to legally enact a guiding principle (for instance: 'requirements of overall economic equilibrium'[36]). In doing so, the status or character of the principle changes, as it becomes legally binding. It is now part of the legal system and, as such, subject to its intrinsic properties.

What are the benefits for the legal system of a legal guiding principle? Three aspects merit attention:
(1) A *descriptive benefit* can be ascertained. Guiding principles refer to certain ideas of what can be achieved in reality that need to be specified and described. It is not only the explicit and concrete content of a guiding principle that is of interest, but also what it omits or assumes. The notion of a 'social market economy' comprises certain descriptive elements of a market, while the notion of 'sustainability' entails a certain interaction with our eco-system, with nature.
(2) A *judging benefit* should be mentioned. Guiding principles can help to assess or judge descriptive phenomena as something positive (in the sense of a role model) or something negative (detrimental). These assessments or judgments can alter,

[36] See for example Art. 109 para. 2 GG; Law on the promotion of economic stability and sustainable growth (StabG), 8 June 1976, BGBl. I p. 582.

according to the times and the needs of a society. For example, during times of economic recession, 'debt policy' is perceived differently than in prosperous times.
(3) Finally, guiding principles can provide *concrete tasks* to be completed or, at least, indicate such tasks. With their description or assessment, they can pave the way for requirements for accomplishing their objectives. They do not, however, provide any concrete means or instruments by which these tasks shall be accomplished.

II. Integration: the current guiding principle of migration law

Current debates indicate that integration is the guiding principle of migration policy. If so, then it has replaced the preceding debates about multiculturalism and mainstream or 'guiding' culture. This is the reason why our research places this phenomenon at its centre. It is able to cover many facets of societal and legal developments, which renders it quite effective.

1. 'Integration': a guiding principle in law

The notion of 'integration' is not new in domestic debates surrounding immigration, although it did not have the same salience until recently. State and social theory has for some time employed the notion of integration, but in a much broader, more comprehensive sense. It has in this form been an important notion in academic debates for a century.[37] Ever since the concept arose it has been employed in different phases of Germany history with various levels of importance to the debates.[38] Usually, 'integration' is associated with positive connotations. The notion has proved to be very adaptable and receptive, as it can describe a wide range of social phenomena, not necessarily only migration developments.[39] There was no need to invent a new notion or term. 'Integration' as such already existed in debates and was perceived positively. It was only necessary to add a new dimension to it that could build upon already existing qualities.

[37] The theory of integration by R. Smend (1928) should be mentioned as example; idem, Verfassung und Verfassungsrecht, München 1928; to their former contemporary significance M. Stolleis, Geschichte des öffentlichen Rechts in Deutschland Bd. III, 2002, p. 175.
[38] Regarding the 1950s see: Stolleis Bd. IV, 2012, p. 358.
[39] The online encyclopedia Wikipedia contains a whole variety of different ways to use the term in different scientific disciplines.

The notion of integration is characterised through its rather broad meaning, as evidenced in the way many disciplines utilise the notion with different content.[40] To prevent possible misunderstandings, researchers have developed tables with integration benchmarks and indicators that carve out and partly combine various characteristics. These characteristics allow for understanding and forming an opinion on the phenomenon of social heterogeneity and diversity based on a set of different criteria. The 'super diversity', perceived as societal status quo, shall be examined – based on the aforementioned characteristics – and shall become the subject of legal steering.

In our context integration comprises of two dimensions: the objective and the process focusing on the objective. That means the process is accomplished if the goal is reached, associated with the process. The process is not successful, as long as the anticipated results are not achieved. Should this be the case, the process can be continued, be repeated or caught up[41] to reach the anticipated objectives. One has to bear in mind that the aim is not necessarily a static, solid one, but might interact with societal developments and thus has the potential to be never-ending.[42] The intention of the guiding principle and the concrete acts can interrelate and interact in such a way that the objective of integration is defined anew. Time plays a crucial role in this regard, in that achievements in integration processes cannot be pre-determined or simply put straight into place. The process is an open one with many intermediary steps, and is based on cooperation.

The open property of the concept of integration contributes to its particular capacity. Four important aspects should be noted. Firstly, it focuses on the positive aspects and does not mention possible impediments. It presupposes heterogeneity, because in a societal situation that is homogenous questions relating to integration do not arise. Simultaneously, it assesses the heterogeneity negatively, as its objective lies in the integration of the heterogenic societal composition. If heterogeneity or diversity were to be automatically tolerated or accepted in a well-functioning society, then no integration would be needed. The notion of integration has such an attraction, because it does not contain the assessment of a societal situation and its

[40] Reichel, Staatsbürgerschaft und Integration, Wiesbaden 2011, p. 83.
[41] Thym (Fn 35) p. 277.
[42] Beck (Fn 15) p. 29.

qualification underpins it indirectly. The notion only describes the desired societal development, the integration itself. Secondly, the notion integration entails another, open dimension. The objective, the goal of integration, cannot clearly be defined and presumably should not be specified. Without saying so, integration assumes that the state *before* integration needs to be evaluated, revised and then altered, thus integrated. Once integration has taken place, this situation, this societal state, is perceived as something that has been achieved, accomplished, without necessarily referring to the content of the objective followed. The notion of integration, employed in its openness, does as a result not disintegrate, as it excludes more or less any discussion on the specific aim or concrete objective of the integration process. Thirdly, the notion of integration does not prescribe concrete acts. It does not contain any instruments or a catalogue of measures. It starts with the question: who shall integrate? The person or group potentially concerned can voluntarily accomplish the process of integration. This would be a consensus-based approach. Integration can also be pushed forward by third parties and in this form would be external pressure. However, it is quite unlikely that a successful process of integration can be achieved and maintained without the active and consent participation of those integrated. The phenomenon of integration depends on consensus. Simultaneously, the notion does not make any reference how to achieve consensus, as in whether it be done voluntarily, through manipulation or even unilaterally. This adds to the principle's attraction. Finally, it is a special feature of the principle that it does not clearly define the individuals or groups taking part in the integration process. It is an open question as to who is required to accomplish integration. This applies especially in cases in which the group of persons establishing requirements for integration are not the group of persons who will fulfil the set-up requirements. The example of an external integration process, i.e. integration by a third party, illustrates this open character of the principle.[43] On the other hand, the process of integration allows one to gain an advantage out of it without necessarily being involved. It is common societal behaviour for actors to gauge burden against the possible individual benefit. Migration policy illustrates this quite clearly. It is rather open as to who shall be obliged to accomplish integration processes. Is this a task only to be fulfilled by immigrants, or shall the majority of the population in a given country also be part of

[43] The complex nature of steering an integration process by third parties that may be addressed by integration processes, but do not necessarily need to integrate themselves is addressed by M. Baurmann, Der Markt der Tugend, 1996.

the process? This question is not linked with the consideration of who shall benefit from the positive results of an accomplished integration process. Sometimes forgotten is the fact that it is not only the migrant population that can benefit from successful integration processes, but also the society as a whole. Presumably, the popularity of the principle of integration can be found in its openness: who is obliged to fulfil integration requirements and who benefits from the results is not clearly defined.

It is this openness of the principle that concedes integration a predominant position compared to its predecessors. Multiculturalism as a starting point and possible societal objectives are simply not mentioned. With this approach, the concept of integration does not need to articulate a stance towards the concept of multiculturalism. The concept of one society as a whole in which a diversity of cultures exists and fruitfully interacts might be the objective of a comprehensive integration process addressing all members of a society, but it is not necessary to directly refer to this objective. As such, the concepts do not contradict each other, but the guiding principle of integration neglects possible conflicts inherent to the principle of multiculturalism. Comparable patterns can be ascertained regarding the concept of a mainstream or ‘guiding’ culture. The latter comprises a judgment that triggers debates and prompts conflicts. The concept of integration, however, simply blinds out the underpinning view. It is possible that political streams supporting the idea of integration will eventually seek to espouse the mainstream or ‘guiding’ culture concept. The concept of integration does not replace one or both predecessors, and it is not yet decided as to whether it interacts with either of them. This might be its particular strength.

2. ‘Integration’ as guiding principle in migration law

Integration has influenced the current German migration law in many different ways. This is a fundamental difference between it and the older guiding principles. Although they also interacted with the legal sphere, they were not strictly part of it. It was in the late 1980s that the notion found its way into draft legislation presented by the then Federal Government, although it was not apparent in legal provisions in form of

concrete measures or instruments.[44] Furthermore, the concept of integration employed during that time narrowed its meaning, as it came to comprise only of possible integration requirements to be achieved by the migrant population. The non-migrant population was not necessarily part of the integration process. The Aliens Act (AuslG) of 1990 provided for German language requirements before issuing a specific residence permit. The same applied to naturalisation requirements (Art. 24 para 1 no. 4; Art. 86 no. 1 AuslG).

The situation changed in 2005 when the new immigration law came into force. For the first time in German post-war history, the concept of integration included the majority German population as an active part of the integration process. Integration was no longer a temporary phenomenon, but a continuous ongoing process.[45] The legislature introduced the notion of integration prominently in the core immigration law: the Residence Act (*Aufenthaltsgesetz*, AufenthG), German Nationality Act (*Staatsangehörigkeitsgesetz*, StAG), Freedom of Movement Act (*Freizügigkeitsgesetz*, FreizügG/EU) as well as the Integration Course Regulation (*Integrationskursverordnung,* IntV). For example, the Residence Act's long title describes it as an 'Act on the residence, the employment and the integration of foreigners in the Federal Republic of Germany.' Article 1 para. 1 of the Residence Act stipulates the integration of foreigners as one of the act's objectives. Capacity for integration is another key element of the law concerning immigration. Chapter 3 of the Residence Act (Arts. 43ff.) is officially entitled 'integration' and mentions 'integration courses' as well as 'integration programmes' as instruments to achieve this end.[46] Many other provisions in the Residence Act or the German Nationality Act contain references to the notion of integration, testifying to its importance. However, the legislature omitted to provide any legal definition of the concept.[47] An analysis of the legal provisions nevertheless discloses that the legislature has assigned the notion three distinct functions. The first is that the person who takes part in the

[44] The predominant idea of migration policy in the early 1980s was the 'repatriation' of immigrants. This changed in the late 1980s. The Federal Government supported the idea that migrants living in Germany had to accept the legal, social and economic system. At the same time it accepted the state's integration responsibility to allow existing migrants to participate in social, economic, and cultural life and thus be able to create autonomy. Integrating new migrants was not anticipated at that time.

[45] See: Tryjanowski, Integration von Migrantinnen und Migranten, in: Arndt et al. (eds.), Freiheit - Öffentlichkeit - Sicherheit, Heidelberg 2009, p. 181; BT-Drs. 11/6321 from January 27th 1990, pp. 40f; Luft, Abschied von Multikulti: Wege aus der Integrationskrise, Gräfelfing 2007, pp. 285 f.

[46] Integrationskursverordnung from December 13th 2004, BGBl. I p. 3370.

[47] Thym (Fn 35) pp. 285 ff.

process of integration incrementally acquires a legal position that entitles him or her to obtain full rights like any national living in Germany. The legal process aims to result in legal equality. Once the individual can make use of all rights and has obtained German citizenship, the process of integration is accomplished. It needs to be highlighted that only individuals that have obtained German citizenship are fully included in the national legal system.[48] The legal requirements for obtaining a settlement permit, which is a permanent residence permit, also refer to the degree of integration. An authority thus has to take the actual or envisaged integration into account when deciding on whether to issue a settlement permit.[49] The second function of integration concerns the chance to participate socially, culturally and economically.[50] Immigrants shall be empowered to live in society enjoying the same rights and with access to the same opportunities as the rest of the population. However, state support can also be connected to certain requirements to be fulfilled by the immigrant. This leads to the third function or aspect of the current understanding of the concept, in which integration is understood as an obligation upon immigrants. Some provisions entail requirements for immigrants, and the law provides for sanctions should those requirements not be met. The following distinct integration requirements or obligations[51] can be ascertained: knowledge of the German language, basic knowledge of the legal system and societal fundamental values, and the capacity to earn one's own living. The question of whether the individual poses a threat to the public order is also considered.[52]

If someone applies for a visa to enter the country, the responsible authority can take into account an assessment of the chances the applicant has to integrate.[53] Based on this assessment, the authority can then issue a visa or reject the application. Work permits for migrants follow the same logic. The decision of whether or not to issue the visa depends on the assessment of whether the applicant has achieved a certain degree of integration or, at least, is likely to achieve it. A foreigner who is highly qualified in certain professional areas is likely to immediately obtain a settlement

[48] Niesten-Dietrich, Integration und Staatsangehörigkeit, in: ZAR 2012, p. 86.
[49] Internationaler Migrationsausblick von der OECD 2006, pp. 90 f.
[50] Zweiter Integrationsindikatorenbericht: constructed of ISG / WZB für die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration, 2011, p. 20.
[51] See Groß, Das deutsche Integrationskonzept – vom Fördern zum Fordern?, in: ZAR 2007, p. 315 f.
[52] §§ 43 ff. AufenthG.
[53] Act regarding controlling and restricting immigration and establishing provisions regarding the residence and integration of EU citizens and foreigners from July 30th 2004, BGBl. I p. 1950.

permit, if there are grounds to assume that he or she is able to integrate easily into the 'way of life which prevails' in the Federal Republic of Germany and make a living (Art. 19 para. 1 Residence Act). Integration into the community and society will be considered in cases in which somebody applies for a prolongation of his or her temporary residence permit (Art. 8 para. 3, sentence 3 Residence Act).[54] Finally, integration plays a crucial role during the legal procedure for obtaining German citizenship, (Art. 10 German Nationality Act).

What can be derived from these observations? None of the existing guiding principles have shaped migration law in a comparable manner, as is the case with integration. Simultaneously, the law presupposes the meaning of the guiding principle, as it does not provide any legal definition of what it comprises. Concrete measures are not part of the law, but part of implementing the law. Integration courses, integration programmes and integration tests are some examples of this (see Arts. 43-45 Residence Act). All these measures and instruments are the subject of vivid discussions, especially amongst legal researchers and professionals working in the various related fields. Questions discussed include whether the measures and instruments actually foster integration and whether they efficient and necessary.

For law and jurisprudence this means that integration is more than equality of rights or equal benefits. It seeks to compensate such deficits that can occur when legal provisions are applied equally on partially unequal and different people – that is, people with and people without migration backgrounds. It might be that the concept of (successful) integration, understood as equality of chances, needs to be revised. Older concepts of citizenship,[55] which entail an (equal) participation in social and civil rights, are also not fully satisfying, as integration is understood as a prerequisite for granting equal access. More recent concepts are more differentiated and also more demanding.[56] They analyse the cultural basis for integration[57] or enlarge (or even

[54] The law assumes that integration achievements are fulfilled if the applicant has participated in an integration course, Art. 8 para. 3, sentence 1. Lack of participation in such a course could result in detriment to an applicant's legal position in a residence permit prolongation procedure.
[55] Marshall, Citizenhip and social Class, Cambridge 1950, pp. 71 ff.
[56] An overview is provided by Kötter, Integration durch Recht? Probleme rechtlicher Steuerung infolge kultureller und sozialer Pluralität"; Stefan Luft / Peter Schimany (eds.), Integration von Zuwanderern: Erfahrungen, Konzepte, Perspektiven, 2010, pp. 123-155; Oberndörfer, Integration der Ausländer in den demokratischen Verfassungsstaat: Ziele und Aufgaben; Bade, Klaus (ed.) Integration und Illegalität in Deutschland, IMIS, 2001, pp. 11-30.

substitute) the concept of integration with the concept of 'social cohesion'.[58] They focus on the capacity of the whole society, be it immigrants or German citizens, to live in accordance with the existing constitution and legislation, including the dispute settlement mechanisms. It should be the aim of any integration effort to empower 'the individual to adhere to the legal provisions and to also to want this.'[59] Any further requirements should not be considered part of the notion of integration. The state must not interpret integration to mean the loss of immigrants' own culture. In contrast, the state should allow different societal groups to preserve their autonomy. This approach matches the German Federal Constitutional Court's position. The court states that individuals are obliged to adhere to the legal standards, but this does not include a loyalty pledge to the constitution.[60]

Is this mirrored in migration law? The position in the current immigration legislation shows that the law mainly imposes integration efforts on immigrants. The non-migrant population as well as public bodies in society assume the role of providing integration services, being also partly responsible for funding. Furthermore, integration efforts or integration services focus mainly on the integration processes until legal naturalisation. Once the German citizenship is acquired, it is assumed that the integration process is accomplished.[61] The actual process of integration may nevertheless not have stopped. For example, one's background as immigrant may still have repercussions for integration into the education system in Germany.[62] Integration services for migrants illustrate that the number of services specifically for ethnic German migrants have decreased. This is also due to the fact that the law no longer differentiates so strictly between ethnic Germans and immigrants with other countries of origin.

One has to bear in mind that these observations and considerations are drawn from the existing residence and nationality law. As such, they do not necessarily properly

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[57] See the cluster of excellence at the University of Konstanz (Germany), which works with an integration concept that focuses not only on migration questions.

[58] See for example S. Eizaguirre u.a., Multilevel Governance and Social Cohesion: Bringing back Conflict in Citizenship Practices, in: Urban Studies 2012, 1999.

[59] Kötter, p. 139 to the following ibid., pp. 138, 140.

[60] BVerfGE 102, 370 (390 ff.)

[61] Niesten-Dietrich (Fn 51) p. 86.

[62] „Deutschland braucht ein Bildungssystem, das Chancen eröffnet, Potenziale entfalten und Bildungserfolge nicht von sozialer Herkunft abhängig macht" – Nationaler Integrationsplan der Bundesregierung: Neue Wege – Neue Chancen, 2009, pp. 63 ff.

represent the outcome or the confines of the integration concept.[63] If an analysis also included social law, education law and other legal fields relevant to the whole immigration process, the results might lead to a much more differentiated view. It could also disclose frictions and inconsistencies among the different legal fields.

For the time being, the following questions need to be addressed:

- whether integration has replaced preceding guiding principles or only complemented them,
- whether integration is to be understood as a static or dynamic guiding principle,
- what are the sources of benchmarks or indicators for integration achievements are and how these are transposed into legally applicable measures,
- whether those benchmarks and the legally applicable measures are the outcome of a debate and a dialogue with immigrants or are they the sole product of the German majority?

3. Integration concepts in other states and in the European Union: a comparison

Migration and the attempt to steer immigration legally is common throughout Europe. The question arises as to whether European countries of immigration other than Germany act in the same way, so parallel instruments and measures could be ascertained, or whether they act differently.[64] The same question could be addressed on the European level, as more and more regulation stems from the European Union legislature. The European legislation is partially premised on domestic guiding principles, but also introduces its own concepts and suggestions. The question arises as to whether the European legislature ascribes the concept of integration a specific role, and, if so, which role this is. Does the European legislation provide alternative concepts which shed a different light on the German domestic view? Such a comparative approach could also clarify the specific domestic concept adhered to in Germany. Finally, the process of European integration has increasingly led to including migration law in European legislation, especially since the Lisbon Treaty.[65] The changes coming along with these developments merit attention as well. All these

[63] See for more information Thym (Fn 35) p. 320.
[64] Baasner, Einleitung, in: Baasner (ed.) (Fn 4), pp. 7 ff.
[65] The Treaty of Lisbon entered into force on December 1st 2009. By this Treaty, the high contracting Parties establish among themselves a European Union, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common. Art. 1 TEU.

aspects and questions will be addressed, analysed and discussed at a conference scheduled for December 2012 with an international composition.

Immigration towards Europe, especially towards the European Union, and within Europe is a quite common phenomenon. It is a simple fact that a high number of foreigners reside and are settled in countries of immigration such as France, United Kingdom, Switzerland and Germany.[66] It is acknowledged that integration processes require great efforts of immigrants, but also include the majority of the population, as they interact as one society. Consequently, integration is perceived as a societal as well as a state responsibility. The December 2012 conference seeks to shed some light on the question how France, United Kingdom, Switzerland and Germany fulfil their duties in this regard. This will be addressed through the following discussions:[67]

1. Do domestic debates and legislation employ the notion of integration – or comparable notions – in connection with foreigners? If this is the case, how is it interpreted, what is the concrete understanding of it? Does integration only consist of immigrants' efforts and obligations, or does the concept follow a broader, more holistic approach and perceive integration as something to be achieved by society as a whole, including the majority population? This process could also lead to a change, a transformation of the society. Integration can either be seen as a requirement upon the immigrant to assimilate and adapt the societal conditions in an immigration country, or an enrichment to the whole society, in which the immigrants' cultures can be allowed to uphold their distinct nature. This leads to the question of what societal, legal or political developments have occurred regarding the understanding of integration.
2. Does integration require the state to act or is it understood as a voluntary task performed by the society?
3. Do benchmark tests exist to evaluate the degree of an integration process?
4. Do immigrants obtain a legal position that entitles them to participate in integration services? If this is the case, what are the requirements for such a legal position? Are differentiations made in reference to the type of residence permit (labour migrant, asylum seeker, family reunification), the duration of the residence, the citizenship (European Union citizen, third country national, migrants from European Union-associated countries)?

[66] Baasner (Fn 65) pp. 7f.
[67] We wish to thank Dr. J. Niesten-Dietrich, Bielefeld who prepared the questionnaire.

5. What is the relation between integration achievements and residence permits? Does knowledge of the language, employment and educational training influence the issuing of a visa, the decision on prolongation of residence permits or naturalisation?
6. Does the law contain sanctions imposed in cases in which integration offers are rejected (for instance rejection of an application to prolong a residence permit, cuts in social benefits payments, legal withdrawal of a naturalisation decision)?
7. Do integration courses or other services exist for ethnic German migrants?
8. Does a national integration concept exist? If so, what are its main objectives? Does it seek to achieve formal equality in terms of equal rights for everybody or does it follow the approach of factual equal treatment, including a possible positive discrimination?
9. What are current problems and issues regarding integration of immigrants?

The results of the research focusing on these questions and issues shall help to revise the German model of integration by identifying its shortcomings, as well as best practices and possible refinements.

III. Heterogeneity – Inequality – Integration: an outlook

Integration presupposes inequality, but also creates new inequalities. Looking at the experiences with integration processes in the past, it seems necessary to address this inequality. Although integration is a task of society as a whole – including all individuals irrespective of their origin – the state should complement the process with regulatory instruments.[68] It is admittedly not easy to define the role of state authorities in integration processes, because the concept itself is not clearly defined. It does not comprise of concrete measures or instruments, but is formulate in an abstract way with a range of possible objectives. Furthermore, the role of regulatory authorities and other state bodies differ from the role of immigrants. The state and its legislative branches are not called upon to fulfil the integration processes, but rather to enhance chances for immigrants. Integration law as such does not achieve integration, but establishes its framework conditions.[69]

[68] Bauböck, Gleichheit, Vielfalt und Zusammenhalt, in: Bauböck /Volf (eds.), Wege zur Integration, Klagenfurt 2001, pp. 21 ff.
[69] Davy (Fn 15, 20) p. 85.

Integration indicators, or benchmarks, are crucial when implementing integration law. From a practitioner's point of view, integration law may assume the character of the sum of integration indicators.[70] It rests with the integration indicators to specify the concept of integration and to allow an evaluation of the integration process. This comes with a risk, as the indicators can alter or distort the guiding principles. This consideration merits further attention. However, any change of indicators seems to have an ambiguous effect. By forming part of the guiding principle influencing the applicable law, a given indicator can cause legal discrimination. One example could be a distinction between education for residents and education for foreigners. If the indicator as such or its legal understanding (such, in this example, to a distinction between well educated and not well educated) is changed, legal discrimination can be partially diminished, but also created anew. Acts of discrimination thus take place along the new line of the guiding principle, by which inclusion causes new, or newly defined, exclusion. These processes are, however, not static, but dynamic, as is the whole process of immigration.

Legally binding or legally relevant indicators of integration may facilitate differentiation based on individuals' characteristics. As such, indicators may diminish inequality but also create it. This is part of its ambiguous effect – much like the ambiguous effect of its changes. Any form of inequality needs to be legitimised reasonably, which poses the question of new guiding principle has the capacity to interact adequately with integration law. This is another example of the ambiguous character of the guiding principle of integration. It comprises a duty to act in order to diminish inequality, but simultaneously legitimises new forms of inequality.

A guiding principle based on integration presupposes heterogeneity (from a legal point of view: factual inequality) and generates inequality (from a legal point of view: legal discrimination). To probe into its actual capacity the following questions have to be addressed:

- whether the basic assumption that integration has actually replaced preceding concepts of guiding principles or only complemented them can be verified,
- whether integration is to be understood as static or dynamic guiding principle,

[70] The second report on the integration indicators from the federal government's Commissioner for Migration, Integration and Refugees (2012) comprises almost a hundred integration indicators.

- what the sources of benchmarks or indicators for integration achievements are and how those are transposed into legally applicable measures,
- whether those benchmarks and thus the legally applicable measures are the outcome of debate and dialogue with immigrants or are they the sole product of the German majority?

IV. Conclusion

The first observation is dedicated to immigration to and emigration from Germany. Although immigrants moved to and settled in Germany (or in former times the various states), it was traditionally a country of emigration. This changed in the period after the Second World War, as Germany became a de facto country of immigration, but had not been perceived as such legally and only reluctantly politically. In the late 1990s, political opinion altered and resulted into the Immigration Act (*Zuwanderungsgesetz*, 2004), containing the new Residence Act.

The legislature, administration and courts find orientation in guiding principles when forming and implementing law. The law does not necessarily contain these guiding principles, as they are likely to be found outside the legal sphere. Those bodies that implement or enact law approach legal provisions with the precondition of guiding principles, as long as they cannot derive them from the law.

In the past, German migration law was not well developed. It contained only limited means to steer migration to Germany. This is partly still the case in the current Residence Act (2004), which forms the current German migration legal framework. The guiding principles applicable for migration law have changed considerably in the Federal Republic of Germany during the last decades. These changes took place irrespective of any legislative amendments. The early general idea of a rotation of guest workers in Germany was replaced by other principles. In the 1990s the guiding principles of a multicultural society and the main culture prevailed, while now the principle of integration dominates.

Guiding principles can influence and even steer migrants' rights and obligations. This applies for the first legal permission necessary to cross the border. Whether one

obtains a permanent residence permit or whether family members are entitled to stay in Germany can be steered by those guiding principles. The same counts for naturalisation and goes even beyond, as illustrated in the enduring notion of a migrant and, subsequently, someone with a ‘migrant background’.

The terminology of the current guiding principle ‘integration’ is rooted in preceding decisions, including, but not restricted to migration law. Its meaning has, however, evolved and it has assumed a new position in present days. This applies to its interpretation as well as its legal salience. It is the task of this project to explore this new position more comprehensively and – also in delineation to other, older guiding principles – to reach a clearer understanding.

Migration presumes inequality and creates new inequality. However, any change of indicators seems to have an ambiguous effect. Being part of the guiding principle influencing the applicable law, a given indicator can cause legal discrimination (such as education for residents as distinguished from education for foreigners). If the indicator as such or its legal understanding (such as the notion of being well educated as opposed to not being well educated) is changed, legal discrimination can be partially diminished, but also created anew. Acts of discrimination take place along the new line of the guiding principle, in which inclusion causes new or newly defined exclusion. These processes are not static, but dynamic. This can be said about the whole process of immigration.

Indicators of integration may facilitate differentiation between individuals’ characteristics. As such, indicators may diminish inequality but also create it. This is part of its ambiguous effect, much like the ambiguous effect of its changes. A guiding principle based on integration presupposes heterogeneity (from a legal point of view: factual inequality) and generates inequality (from a legal point of view: legal discrimination). Any form of inequality needs to be reasonably legitimised. This poses the question as to whether the new guiding principle has the capacity to interact adequately with the law. This is another example of the ambiguous character of the guiding principle of integration. It comprises a duty to act in order to diminish inequality, but simultaneously legitimises new forms of inequality.

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